

## UNITED STATES INTERNATIONAL TRADE COMMISSION

### Summary of Commission Practice Relating to Administrative Protective Orders

AGENCY: U.S. International Trade Commission

ACTION: Summary of Commission practice relating to administrative protective orders.

SUMMARY: Since February 1991, the U.S. International Trade Commission (“Commission”) has issued an annual report on the status of its practice with respect to violations of its administrative protective orders (“APOs”) in investigations under Title VII of the Tariff Act of 1930 in response to a direction contained in the Conference Report to the Customs and Trade Act of 1990. Over time, the Commission has added to its report discussions of APO breaches in Commission proceedings other than Title VII and violations of the Commission’s rule on bracketing business proprietary information (“BPI”)(the “24-hour rule”), 19 CFR 207.3(c). This notice provides a summary of investigations of breaches in Title VII investigations for the period ending December 31, 1999. There were no investigations of breaches for other Commission proceedings or for 24-hour rule violations during that period. The Commission intends that this report educate representatives of parties to Commission proceedings as to some specific types of APO breaches encountered by the Commission and the corresponding types of actions the Commission has taken.

FOR FURTHER INFORMATION CONTACT: Carol McCue Verratti, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone (202) 205-3088. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal at (202) 205-1810. General information concerning the Commission

can also be obtained by accessing its Internet server (<http://www.usitc.gov>).

SUPPLEMENTARY INFORMATION: Representatives of parties to investigations conducted under Title VII of the Tariff Act of 1930 may enter into APOs that permit them, under strict conditions, to obtain access to BPI of other parties. See 19 U.S.C. 1677f; 19 CFR 207.7. The discussion below describes APO breach investigations that the Commission has completed, including a description of actions taken in response to breaches. The discussion covers breach investigations completed during calendar year 1999.

Since 1991, the Commission has published annually a summary of its actions in response to violations of Commission APOs and the 24-hour rule. See 56 FR 4846 (Feb. 6, 1991); 57 FR 12,335 (Apr. 9, 1992); 58 FR 21,991 (Apr. 26, 1993); 59 FR 16,834 (Apr. 8, 1994); 60 FR 24,880 (May 10, 1995); 61 FR 21,203 (May 9, 1996); 62 FR 13,164 (March 19, 1997); 63 FR 25064 (May 6, 1998); 64 FR 23355 (April 30, 1999). This report does not provide an exclusive list of conduct that will be deemed to be a breach of the Commission's APOs. APO breach inquiries are considered on a case-by-case basis.

As part of the effort to educate practitioners about the Commission's current APO practice, the Commission Secretary issued in April 1996 a revised edition of An Introduction to Administrative Protective Order Practice in Antidumping and Countervailing Duty Investigations (Pub. No. 2961). This document is available upon request from the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW, Washington, DC 20436, tel. (202) 205-2000.

#### I. In General

The current APO form for antidumping and countervailing duty investigations, which the Commission has used since March 1995, requires the applicant to swear that he or she will:

(1) Not divulge any of the BPI obtained under the APO and not otherwise available to him, to any person other than--

- (i) personnel of the Commission concerned with the investigation,
- (ii) the person or agency from whom the BPI was obtained,
- (iii) a person whose application for disclosure of BPI under this APO has been granted by the Secretary, and
- (iv) other persons, such as paralegals and clerical staff, who (a) are employed or supervised by and under the direction and control of the authorized applicant or another authorized applicant in the same firm whose application has been granted; (b) have a need thereof in connection with the investigation; (c) are not involved in competitive decisionmaking for the interested party which is a party to the investigation; and (d) have submitted to the Secretary a signed Acknowledgment for Clerical Personnel in the form attached hereto (the authorized applicant shall sign such acknowledgment and will be deemed responsible for such persons' compliance with the APO);

(2) Use such BPI solely for the purposes of the Commission investigation [or for binational panel review of such Commission investigation or until superceded by a judicial protective order in a judicial review of the proceeding];

(3) Not consult with any person not described in paragraph (1) concerning BPI disclosed under this APO without first having received the written consent of the Secretary and the party or the representative of the party from whom such BPI was obtained;

(4) Whenever materials (e.g., documents, computer disks, etc.) containing such

BPI are not being used, store such material in a locked file cabinet, vault, safe, or other suitable container (N.B.: storage of BPI on so-called hard disk computer media is to be avoided, because mere erasure of data from such media may not irrecoverably destroy the BPI and may result in violation of paragraph C of the APO);

(5) Serve all materials containing BPI disclosed under this APO as directed by the Secretary and pursuant to section 207.7(f) of the Commission's rules;

(6) Transmit such document containing BPI disclosed under this APO:

(i) with a cover sheet identifying the document as containing BPI,

(ii) with all BPI enclosed in brackets and each page warning that the document contains BPI,

(iii) if the document is to be filed by a deadline, with each page marked "Bracketing of BPI not final for one business day after date of filing," and

(iv) if by mail, within two envelopes, the inner one sealed and marked "Business Proprietary Information--To be opened only by [name of recipient]", and the outer one sealed and not marked as containing BPI;

(7) Comply with the provision of this APO and section 207.7 of the Commission's rules;

(8) Make true and accurate representations in the authorized applicant's application and promptly notify the Secretary of any changes that occur after the submission of the application and that affect the representations made in the application (e.g., change in personnel assigned to the investigation);

(9) Report promptly and confirm in writing to the Secretary any possible breach of the APO; and

(10) Acknowledge that breach of the APO may subject the authorized applicant and other persons to such sanctions or other actions as the Commission deems appropriate including the administrative sanctions and actions set out in this APO.

The APO further provides that breach of protective order may subject an applicant to:

(1) Disbarment from practice in any capacity before the Commission along with such person's partners, associates, employer, and employees, for up to seven years following publication of a determination that the order has been breached;

(2) Referral to the United States Attorney;

(3) In the case of an attorney, accountant, or other professional, referral to the ethics panel of the appropriate professional association;

(4) Such other administrative sanctions as the Commission determines to be appropriate, including public release of or striking from the record any information or briefs submitted by, or on behalf of, such person or the party he represents; denial of further access to business proprietary information in the current or any future investigations before the Commission; and issuance of a public or private letter of reprimand; and

(5) Such other actions, including but not limited to, a warning letter, as the Commission determines to be appropriate.

Commission employees are not signatories to the Commission's APOs and do not obtain access to BPI through APO procedures. Consequently, they are not subject to the requirements of the APO with respect to the handling of BPI. However, Commission employees are subject to strict statutory and regulatory constraints concerning BPI, and face potentially severe penalties for noncompliance. See 18 U.S.C. 1905; Title 5, U.S. Code; and Commission personnel policies

implementing the statutes. Although the Privacy Act (5 U.S.C. 552a) limits the Commission's authority to disclose any personnel action against agency employees, this should not lead the public to conclude that no such actions have been taken.

An important provision of the Commission's rules relating to BPI is the "24-hour" rule. This rule provides that parties have one business day after the deadline for filing documents containing BPI to file a public version of the document. The rule also permits changes to the bracketing of information in the proprietary version within this one-day period. No changes--other than changes in bracketing--may be made to the proprietary version. The rule was intended to reduce the incidence of APO breaches caused by inadequate bracketing and improper placement of BPI. The Commission urges parties to make use of the rule. If a party wishes to make changes to a document other than bracketing, such as typographical changes or other corrections, the party must ask for an extension of time to file an amendment document pursuant to section 201.14(b)(2) of the Commission's rules.

## II. Investigations of Alleged APO Breaches

Upon finding evidence of a breach or receiving information that there is a reason to believe one has occurred, the Commission Secretary notifies relevant offices in the agency that an APO breach investigation file has been opened. Upon receiving notification from the Secretary, the Office of General Counsel (OGC) begins to investigate the matter. The OGC prepares a letter of inquiry to be sent to the alleged breacher over the Secretary's signature to ascertain the alleged breacher's views on whether a breach has occurred. If, after reviewing the response and other relevant information, the Commission determines that a breach has occurred, the Commission often issues a second letter asking the breacher to address the questions of mitigating or aggravating circumstances and possible sanctions or other actions. The Commission then

determines what action to take in response to the breach. In some cases, the Commission has determined that although a breach has occurred, sanctions are not warranted, and therefore has found it unnecessary to issue a second letter concerning what sanctions might be appropriate. Instead, it issues a warning letter to the individual. The Commission retains sole authority to determine whether a breach has occurred and, if so, the appropriate action to be taken.

The records of Commission investigations of alleged APO breaches in antidumping and countervailing duty cases are not publicly available and are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552, section 135(b) of the Customs and Trade Act of 1990, and 19 U.S.C. 1677f(g).

The breach most frequently investigated by the Commission involves the APO's prohibition on the dissemination of BPI to unauthorized persons. Such dissemination usually occurs as the result of failure to delete BPI from public versions of documents filed with the Commission or transmission of proprietary versions of documents to unauthorized recipients. Other breaches have included: the failure to bracket properly BPI in proprietary documents filed with the Commission; the failure to report immediately known violations of an APO; and the failure to supervise adequately non-legal personnel in the handling of BPI.

Counsel participating in Title VII investigations have recently reported to the Commission two potential breaches involving the electronic transmission of public versions of documents. In both cases, the document transmitted appears to be a public document with BPI omitted from brackets. However, the BPI is actually retrievable by manipulating codes in the computer software programs. The Commission is currently conducting investigations of these potential breaches and has not made any determination at this time.

The Commission advised in the preamble to the notice of proposed rulemaking in 1990

that it will permit authorized applicants a certain amount of discretion in choosing the most appropriate method of safeguarding the confidentiality of the information. However, the Commission cautioned authorized applicants that they would be held responsible for safeguarding the confidentiality of all BPI to which they are granted access and warned applicants about the potential hazards of storage on hard disk. The caution in that preamble is restated here:

[T]he Commission suggests that certain safeguards would seem to be particularly useful. When storing business proprietary information on computer disks, for example, storage on floppy disks rather than hard disks is recommended, because deletion of information from a hard disk does not necessarily erase the information, which can often be retrieved using a utilities program. Further, use of business proprietary information on a computer with the capability to communicate with users outside the authorized applicant's office incurs the risk of unauthorized access to the information through such communication. If a computer malfunctions, all business proprietary information should be erased from the machine before it is removed from the authorized applicant's office for repair.

While no safeguard program will insulate an authorized applicant from sanctions in the event of a breach of the administrative protective order, such a program may be a mitigating factor. Preamble to notice of proposed rulemaking, 55 Fed. Reg. 24,100, 21,103 (June 14, 1990).

Sanctions for APO violations serve two basic interests: (a) preserving the confidence of submitters of BPI in the Commission as a reliable protector of BPI; and (b) disciplining breachers and deterring future violations. As the Conference Report to the Omnibus Trade and Competitiveness Act of 1988 observed, "the effective enforcement of limited disclosure under



administrative protective order depends in part on the extent to which private parties have confidence that there are effective sanctions against violation.” H.R. Conf. Rep. No. 576, 100th Cong., 1st Sess. 623 (1988).

The Commission has worked to develop consistent jurisprudence, not only in determining whether a breach has occurred, but also in selecting an appropriate response. In determining the appropriate response, the Commission generally considers mitigating factors such as the unintentional nature of the breach, the lack of prior breaches committed by the breaching party, the corrective measures taken by the breaching party, and the promptness with which the breaching party reported the violation to the Commission. The Commission also considers aggravating circumstances, especially whether persons not under the APO actually read the BPI. The Commission considers whether there are prior breaches by the same person or persons in other investigations and multiple breaches by the same person or persons in the same investigation.

The Commission’s rules permit economists or consultants to obtain access to BPI under the APO if the economist or consultant is under the direction and control of an attorney under the APO, or if the economist or consultant appears regularly before the Commission and represents an interested party who is a party to the investigation. 19 CFR 207.7(a)(3)(B) and (C).

Economists and consultants who obtain access to BPI under the APO under the direction and control of an attorney nonetheless remain individually responsible for complying with the APO. In appropriate circumstances, for example, an economist under the direction and control of an attorney may be held responsible for a breach of the APO by failing to redact APO information from a document that is subsequently filed with the Commission and served as a public document. This is so even though the attorney exercising direction or control over the economist or

consultant may also be held responsible for the breach of the APO.

### III. Specific Investigations in Which Breaches Were Found

The Commission presents the following case studies to educate users about the types of APO breaches found by the Commission. The case studies provide the factual background, the actions taken by the Commission, and the factors considered by the Commission in determining the appropriate actions. The Commission has not included some of the specific facts in the descriptions of investigations where disclosure of such facts could reveal the identity of a particular breacher. Thus, in some cases, apparent inconsistencies in the facts set forth in this notice result from the Commission's inability to disclose particular facts more fully.

**Case 1.** At the direction of the lead attorney in an investigation, a law firm secretary sent copies of a hearing transcript to three of the law firm's clients who were nonsignatories to the APO. The lead attorney became aware of a potential breach of the APO when one of the clients advised him that he had received the in camera version of the hearing transcript. The attorney made arrangements to have one transcript returned without being reviewed and a second returned without the envelope being opened. The attorney had Federal Express intercept the third copy before it was delivered; it was returned unopened. The attorney informed the Commission's Secretary ten days after becoming aware of the potential breach. The Commission determined that the lead attorney and a secretary had breached the APO by transmitting the in camera transcript of the Commission hearing to persons who were not signatories of the APO. In reaching its decision to issue warning letters to the attorney and the secretary, the Commission considered that this was the only breach in which they had been involved, the breach was unintentional, prompt action was taken to remedy the breach, and there was no information available to suggest that the BPI disclosed was actually reviewed by persons not already on the

APO. In addition, the Commission noted in the warning letter to the secretary that she had been acting under the direction of an attorney. The 10-day delay in advising the Commission of the breach was mitigated by the fact that the attorney had been out of the country and prompt action had been taken to retrieve the documents. Noting that the breach arose from a systematic omission of procedures at the law firm for checking Commission documents for BPI, the Commission recommended that the attorney and the firm review their practices for handling Commission documents under the Commission's administrative protective order procedures in order to prevent a recurrence of this type of incident. The Commission determined that the other attorney in the law firm who was a signatory of the APO did not breach the APO.

**Case 2.** An attorney for a party to a Commission investigation informed the Commission by letter that a lead attorney representing another party to the investigation failed to comply with the return or destruction requirements of the APO. Specifically, the lead attorney failed to destroy the APO documents within 60 days after completion of the investigation; he failed to provide certification of destruction from all attorneys in his firm on the APO; and he provided a certificate for an attorney who was not on the APO. The lead attorney did file a certificate of destruction more than two years later than required by the APO.

In responding to the Commission's letter of inquiry, the attorney admitted that there had been a technical violation of the APO, but he explained that the material had been mistakenly retained during the period that the Department of Commerce investigation was under appeal. During that time the material had been secured in a locked file cabinet, no unauthorized persons viewed the material, and it was destroyed promptly at the conclusion of the Commerce appeal process. He also explained that one attorney had left the firm and was unavailable to provide a certificate of destruction. The non-APO attorney who had signed a certificate of destruction

actually had no access to the APO materials.

The Commission determined that a breach had occurred for failing to meet the deadlines in the APO to return or destroy and for failing to certify to the destruction of the materials issued to him under the APO. The Commission noted that the deadlines in the APO are clearly stated and the waiver of the 60-day destruction or return deadline is provided for only in the case of an appeal of the Commission determination, not for an appeal of a Commerce determination. The Commission issued a private letter of reprimand to the attorney. The letter dictated additional restrictions and requirements with which the lead attorney must comply until the record of the breach is expunged, two years from the date of the private letter of reprimand. In reaching its decision on the sanction, the Commission considered that this was the third APO breach by this attorney within a short period of time and that this attorney appears before the Commission on a regular basis. Noting that the breach did not appear to have involved willful misbehavior or gross negligence, it was decided that a public letter of reprimand was not called for in that instance. The attorney was warned, however, that if he is found to have committed another APO breach before his prior breaches are expunged, the Commission would consider a more public form of sanction.

**Case 3.** Counsel in an investigation filed the public version of a document which contained BPI. The BPI had not been bracketed in the confidential version of the brief, and, therefore, was not redacted from the public version of the document. Once counsel became aware of the potential breach, they immediately contacted counsel identified on both the public and APO service lists and instructed them to destroy the pages containing the unredacted BPI. On the next business day, counsel notified the Commission's Secretary of the possible breach and filed corrected pages with the parties and with the Commission.

The Commission determined that two of the three attorneys who signed the document breached the APO by failing to redact BPI from a public version of the document. In making its determination to issue a private letter of reprimand to the lead attorney, the Commission considered that, although the breaches appeared to have been inadvertent and the attorney made prompt efforts to limit the possibility of disclosure to persons not already under the APO, the attorney was involved in multiple breaches over a relatively short period.

In determining not to sanction the second attorney, but instead to issue a letter of warning to that attorney, the Commission considered that this was the only breach in which this attorney had been involved, the breach was unintentional, and that prompt action was taken to remedy the breach.

The Commission determined that the third attorney whose name appeared on the document did not breach the APO because he did not have any responsibility in the preparation or filing of the document.

**Case 4.** Counsel representing a party to an investigation filed a public document which contained a page from which bracketed information had not been redacted. Counsel discovered the error, contacted the Commission's Office of the Secretary the morning after the filing, and corrected the public version of the document before it was placed on file for public inspection. Counsel stated in their affidavits that the error was discovered and corrected prior to service of the public version on the other parties to the investigation, so that no unauthorized person actually saw business proprietary information. In their response to the Commission inquiry, counsel contended that no breach occurred because, although the information in question was bracketed in the documents they cited, it was publicly available from other sources.

The Commission determined that three attorneys breached the APO. Two of the attorneys

failed to redact certain bracketed information which contained specific statements not publicly available. They did not breach the APO with regard to their failure to redact information which was in the public domain at the time they filed their document with the Commission. The Commission determined that the third attorney, the lead attorney, breached the APO by failing to provide adequate supervision over the handling of BPI or to delegate supervisory authority in a reasonable manner. In determining to issue private letters of reprimand to the three attorneys, the Commission considered that the one of the attorneys was involved in three separate breaches and two of the attorneys were involved in two separate breaches of Commission APOs within a short period of time. Mitigating factors were that they reported and corrected the breach promptly and that the firm strengthened its APO procedures subsequent to the breaches. With regard to the lead attorney, the Commission considered that delegating final authority for APO compliance to an attorney who had committed two breaches over a short period of time and a junior attorney who had recently committed an APO breach was not reasonable when there was another experienced attorney available who could have overseen their work. Because one of the attorneys had been involved in three separate breaches over a short period of time and other attorneys in his firm had also been involved in multiple breaches during the same period, the Commission required that the attorney, prior to his next appearance in a Commission investigation, prepare and conduct an APO compliance class for all firm attorneys and staff, and submit to the Commission any materials used in the class and certifications that the class occurred and that all such attorneys and staff attended. The Commission determined that an attorney and a law clerk who were not involved in the preparation of the document did not breach the APO.

**Case 5.** An attorney and an economic consultant representing a party in a Commission investigation filed a public document which contained unbracketed and undeleted BPI. The

potential breach was discovered by both the Commission staff and the counsel on the day the document was filed, and counsel took immediate action to retrieve all of the service copies of the unbracketed document and destroy them. The error was discovered and remedial action was taken quickly enough that the document filed with the Commission was not made available to the public either as hard copy or through the electronic system.

The Commission determined that the attorney and the economic consultant employed by the law firm had breached the APO by not protecting BPI. They mislabeled the document containing BPI as public; they failed to place a warning on each page of the document that contained BPI; and they failed to bracket the BPI and remove it from a public version of the document. In reaching its breach determination, the Commission considered that failure to follow the APO rules and thereby leaving BPI unprotected and potentially available to be disclosed is sufficient to constitute a breach.

The Commission did not issue a sanction but instead issued warning letters to the attorney and economic consultant. In reaching its decision on sanctions, the Commission considered that the breach was unintentional, neither the attorney nor the economist had previously breached a Commission APO, and the law firm acted quickly to mitigate any harmful effects of the breach. The Commission determined that two attorneys, one of whom was the lead attorney, did not breach the APO because they were not involved in the preparation, review, signing or filing of the document. In its letter to the lead attorney, the Commission acknowledged his immediate action to mitigate the effects of the errors which led to the breach.

**Case 6.** An associate with a law firm representing a party to an investigation prepared an outline of testimony for a client/witness who was a nonsignatory to the APO and, although he had been advised earlier in the day by the lead attorney that the information was BPI, he included the BPI

covered under the APO in the outline. The associate then sent an e-mail message to the client with the outline as an attachment. The potential breach was discovered by the lead attorney when he reviewed the outline the next day, and he immediately took steps to retrieve and replace the outline containing the BPI before it was read by the nonsignatory and to inform the Commission Secretary of the potential breach.

The Commission determined that the associate attorney breached the APO by transmitting to a client who was not a signatory to the APO a document which he prepared that contained BPI. In reaching its decision to issue a warning letter, the Commission considered that this was the only breach in which the attorney was involved, that the breach was unintentional, that prompt action was taken to remedy the breach, and that neither the client nor any other non-signatory of the APO actually read the document. The Commission determined that the other attorneys on the APO, including the lead attorney, did not breach the APO because they did not participate in the breach.

#### IV. Investigations in Which No Breach Was Found

During 1999, the Commission completed two investigations in which no breach was found.

**Case 1.** An attorney in an investigation filed a public version of a document which contained bracketed but unredacted information. The bracketed information consisted of citations to submissions by two parties to the investigation which were contained in a footnote of the document. The Commission determined that the attorney did not breach the APO by failing to redact the information because the information revealed was publicly available, and the only information which could be inferred from the citations was otherwise publicly available.

**Case 2.** An attorney in an investigation obtained under an APO release of documents a copy of a



telephone note containing a summary of a conversation between a Commission employee and an employee of the Department of Commerce (Commerce). The attorney called the Commerce employee and discussed the contents of the note with him. The Commerce employee advised the Commission employee of his concern that the attorney's call involved a possible breach of the APO. The Commission determined that the attorney did not breach the APO because the Commerce employee was the person who provided the BPI to the Commission, and an attorney's discussion of information released under the APO with the person or agency from whom the BPI was obtained is permissible.

By order of the Commission.

Donna R. Koehnke  
Secretary

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